IN THE MATTER OR MERCHANT MARINER'S DOCUMENT Z-1002139-D1 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Luis ECHEVARRIA,

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1686

Luis ECHEVARRIA

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 8 June 1967, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for six months outright plus 4 months on 12 months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a bedroom steward on board the United States SS INDEPENDENCE under authority of the document above described, on or about 11 March 1967, Appellant assaulted and battered one Ira T. Lee by kicking and punching him when the vessel was at Dakar, F.W.A.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence certain voyage records of INDEPENDENCE, the testimony of two persons, and medical reports on Ira T. Lee. The Examiner refused to grant the Investigating Officer a delay to obtain another witness. When the Investigating Officer stated that he was not resting his case the Examiner said, "I will deem that you have rested".

In defense, Appellant then offered in evidence his own testimony and statements made about him by other persons. These statement were obtained by an unidentified "private investigator".

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of six months outright plus four months on twelve months' probation.

The decision was served on 9 June 1967. Appeal was timely

filed on 6 July 1967. Appeal was perfected on 26 September 1967.

FINDINGS OF FACT

On 11 March 1967, Appellant was serving as a bedroom steward on board the United States SS INDEPENDENCE and acting under authority of his document while the ship was in the port of Dakar. Because of the action taken here, no findings beyond the jurisdictional facts are made.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It was first urged that the Examiner's findings are based upon uncorroborated testimony.

The second contention is that the Examiner utilized material outside the record, to wit, Appellant's prior record of misconduct and hence was prejudiced in formulating his findings.

APPEARANCE: Marvin L. Lifschutz, Esquire, of New York, New York.

OPINION

I

Appellant's first point on appeal is not discussed because it goes to the weight of the evidence, and if Appellant should be successful on his second point, the first would vanish.

II

When Appellant argues that the "prosecutor tried to bring my previous records into the record of this hearing, by which my attorney had taken proper objection which was sustained by the hearing officer," he refers me to no specific place or point of the record at which such things occurred.

The confused record shows that Appellant's counsel offered evidence of Appellant's good character by way of a private investigator's collection of statements about him. R-72. The Investigating Officer immediately offered that Appellant's entire prior record should be introduced. The Examiner rejected this offer but admitted the evidence as to Appellant's good records.

Whether or not the Examiner should have admitted evidence against Appellant at this point is immaterial.

Appellant's assertedly prime basis of appeal is phrased as

follows:

> ". . . the prosecutor tried to bring my previous record into the record of this hearing by which my attorney had taken proper objection which was sustained by the hearing officer. However, upon reading the opinion of the hearing officer he makes reference to my previous record which as a result of same, it is obvious that he took my previous record into consideration when he formulated his opinion."

In the issuance of his order of 8 June 1967 there is no doubt that the Examiner had considered several prior offenses of Appellant under R.S. 4450. Record of these offenses was not entered in open hearing. There is, in fact, no record of how the Examiner obtained this information at all.

The Examiner not only has the right to know the record of a person against whom a charge has been found proved, he has a duty to ascertain it and evaluate it in determining an appropriate order. But the ascertainment of prior record is as much a part of the hearing as is the taking of evidence. The proof of prior record is customarily, and properly, achieved by the submission by the Investigating Officer of a summary record culled from the party's central file. The regulations however plainly contemplate that this will be done in open hearing and in the presence, if he so chooses, of the person charged. 46 C.F.R. 137.20-175(a).

It should not be necessary her to indicate the several ways in which prior record may be ascertained in a correct fashion. It is certain, though, that the person charged has the right to contest the accuracy of the record presented, and to furnish evidence which might serve to temper the effect of the prior record.

Appellant goes even further here and argues that the Examiner was prejudiced in making his findings by knowledge of the prior record. Unfortunately, there is nothing anywhere either in the record of proceedings or in the written decision to contradict this. In reviews of other decisions from which appeals have been taken, it has been noted that some examiners who habitually reserve decision and do not reconvene to announce findings in open hearing make a point of stating that the prior record was ascertained after the findings had been made. Even this procedure has been successfully attacked by an Appellant who had matters which he wished to submit to Examiner after findings, if the findings were against him. (It is readily apparent that there can be matters which a person charged would not wish to disclose before findings, but which would be helpful to him after findings.) Decision on appeal No. 1472.

In the instant case, there is no such assertion by the Examiner. Such an assertion would be prima facie an adequate reply to an otherwise unsupported accusation such as Appellant makes here. Since the record is defective in this respect, the case must be remanded for correction of the record.

III

This necessity involves some complications. Appellant's counsel and the Examiner are in New York. Appellant now lives in Puerto Rico. (In fact, it appears that Appellant's change of residence, which required him to go from Puerto Rico to New York to testify, is what induced the Examiner to deny the Investigating Officer an adjournment in order to secure another witness.) The fact that 46 C.F.R. 137.20-175(d) was not complied with in designating Appellant's counsel as authorized to accept service of the Examiner's decision is waived by Appellant's later specific authorization for the same counsel to act for him in matters arising after service of the decision.

This case must be remanded to the Examiner who heard it. Since this is not a case like that in Decision on Appeal No. 1472, cited above, where the findings of the Examiner were affirmable separately from his order, it is not enough merely to set aside the order. Appellant's claim here is that the findings of fact themselves are tainted.

Thus, both the findings and the order must be set aside.

However, the appeal raises only the question of when the Examiner ascertained the prior record of Appellant, and makes no offer of proof to dispute the authenticity of the prior record or offer of counteracting evidence.

CONCLUSION

There appears, from the grounds of appeal stated, no reason to order a reopening of the hearing. If the Examiner can supplement his decision by a statement that the prior record was not considered before his findings were made, that statement will be sufficient to justify a later order on appeal affirming his findings and order. If the statement is that he did consider the prior record, necessarily a later order must be issued to set aside the decision, or the Examiner himself may reevaluate his findings.

The appropriate statement should be in the form of a supplementary decision which must be served upon Counsel, but this supplementary decision will be conclusive and will not permit any further appeal. The supplement may incorporate all findings

previously made and opinion previously given by reference, if this is appropriate. The supplement shall be immediately forwarded to the Commandant (CL).

ORDER

The Findings and Order entered by the Examiner at New York, New York, on 8 June 1967 are SET ASIDE. The case is REMANDED for action consistent with the opinions and conclusion herein.

W. J. SMITH
Admiral, U. S. coast Guard
Commandant

Signed at Washington, D. C., this 18th day of March 1968.

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